BALAKRISHNAN KALIAPPAN v. SHAMEENA NATHESAN

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ZALEHA YUSOF JCA
RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: B-02(A)-2011-10-2017]
4 APRIL 2019

FAMILY LAW: *Divorce – Matrimonial assets – Matrimonial home – Claim for sole right by wife – Whether husband had proprietary rights – Whether house acquired through sole effort of wife – Whether husband contributed in acquisition and improvements of house – Law Reform (Marriage and Divorce) Act 1976, s. 76(5)*

In 2013, the respondent ('wife') filed a divorce petition to, *inter alia*, dissolve the marriage and for the sole right over the matrimonial home but it was dismissed by the High Court on 12 January 2015. On 29 July 2015, her appeal to the Court of Appeal was allowed in part, in that, the order in respect of the matrimonial home was set aside. On 28 September 2015, the Marriage Tribunal ('Tribunal') issued a certificate that the marriage was beyond saving although the interviews by the Tribunal with the parties were held before the filing of the earlier petition. Following the dismissal of the appeal and the issuance of the certificate, the wife filed the second petition. The second petition was filed after two fresh police reports were made by the wife against the appellant ('husband') on the same allegations of physical threats and abuses made in two earlier ones as well as her inability to access the matrimonial home. The Judicial Commissioner ('JC') granted the petition wherein the marriage was dissolved and the wife was given the sole right over the matrimonial home. The husband was also restrained from entering or staying in the house and to come into close contact with the wife on account of physical and mental abuse suffered by her at his hands. Hence, the appeal by the husband. The husband submitted that he had beneficial interest in the house and had a right of occupation over it and therefore, the restraining order and/or eviction orders were wrongly granted.

Held (dismissing appeal)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) The parties had lived apart after the wife moved out sometime in 2013. The police reports made by the wife and the first divorce petition filed by her justified the evidence that she moved out. Further, the Tribunal found that their differences were irreconcilable. In the face of all the evidence, the dissolution of the marriage was the only option left to the parties. (para 3)

(2) Section 76(5) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') provides that assets acquired during a marriage includes the ones acquired before the marriage by one party but which 'have been substantially improved during the marriage by the other party or by their joint efforts'. The fact that the house had been the place of cohabitation after the marriage, did not mean that the husband had proprietary rights over it, even when taken with the fact that, at the material time of the trial of the second petition, the husband was still residing in the house. Based on the evidence, the acquisition of the house was by the sole effort of the wife before the marriage and there was no substantial improvement to it by the husband after the marriage. The husband had failed to prove that he had a hand in the acquisition of and had made improvements to the matrimonial home. (paras 5 & 9)

(3) In order to resort to the aid of a resulting trust, the husband bore the burden of proving that he paid fully or partly for the purchase of the matrimonial home. However, the evidence did not support that this was so. Based on the clear and explicit provision which caters for acquisition of property prior to the marriage under s. 76(5) of the LRA, the issue of a resulting trust did not arise at all. (para 10)

Bahasa Malaysia *Headnotes*

Pada 2013, responden ('si isteri') memfailkan petisyen perceraian untuk, antara lain, pembubaran perkahwinan dan hak tunggal terhadap rumah perkahwinan tetapi ditolak Mahkamah Tinggi pada 12 Januari 2015. Pada 29 Julai 2015, rayuannya ke Mahkamah Rayuan dibenarkan sebahagian, iaitu, perintah berkaitan rumah perkahwinan diketepikan. Pada 28 September 2015, Tribunal Perkahwinan ('Tribunal') mengeluarkan sijil bahawa perkahwinan itu tidak boleh diselamatkan walaupun temu duga oleh Tribunal itu dengan pihak-pihak dibuat sebelum pemfailan petisyen terdahulu. Berikutan penolakan rayuan dan pengeluaran sijil itu, si isteri memfailkan petisyen kedua. Petisyen kedua difailkan selepas dua laporan polis baharu dibuat oleh si isteri terhadap perayu ('si suami') tentang dakwaan ugutan dan penderaan fizikal yang dibuat dalam dua yang terdahulu serta ketidakupayaan mengakses rumah perkahwinan. Pesuruhjaya Kehakiman ('PK') membenarkan petisyen tersebut dan perkahwinan itu dibubarkan dan si isteri diberi hak tunggal terhadap rumah perkahwinan. Si suami juga dihalang daripada memasuki atau menetap di rumah itu dan menghampiri si isteri atas alasan penderaan fizikal dan mental yang diakibatkan pada si isteri oleh si suami. Oleh itu, rayuan ini oleh si suami. Si suami menghujahkan dia mempunyai kepentingan benefisial terhadap rumah itu dan mempunyai hak menetap di situ dan oleh itu, perintah halangan dan/atau pengusiran diberi secara salah.

Diputuskan (menolak rayuan)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Pihak-pihak tinggal berasingan selepas si isteri meninggalkan rumah kira-kira pada 2013. Laporan polis si isteri dan petisyen perceraian pertama yang difailkannya menjustifikasi keterangan yang si isteri meninggalkan rumah itu pada 2013. Selanjutnya Tribunal mendapati bahawa persengketaan mereka tidak boleh didamaikan. Berdasarkan kesemua keterangan, pembubaran perkahwinan ialah satu-satunya pilihan buat pihak-pihak.

(2) Seksyen 76(5) Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta') memperuntukkan bahawa aset-aset yang diperoleh semasa perkahwinan termasuk aset yang dipunyai sebelum perkahwinan itu oleh satu pihak yang telah 'banyak ditambah baik semasa perkahwinan itu oleh pihak yang satu lagi atau dengan usaha bersama mereka'. Fakta rumah itu menjadi tempat tinggal mereka selepas perkahwinan, tidak bermaksud si suami mempunyai hak proprietari terhadap rumah itu, walaupun dengan fakta bahawa, pada masa perbicaraan petisyen kedua, si suami masih menetap di rumah itu. Berdasarkan keterangan, pemerolehan rumah itu adalah atas usaha tunggal si isteri sebelum perkahwinan dan tiada penambahbaikan substansial dibuat oleh si suami selepas perkahwinan. Si suami gagal membuktikan bahawa dia menyumbang dalam pemerolehan atau membuat penambahbaikan rumah perkahwinan itu.

(3) Dalam sandaran pada amanah berbangkit, beban dipikul oleh si suami untuk membuktikan dia telah membayar sepenuhnya atau sebahagian harga belian rumah perkahwinan itu. Walau bagaimanapun, keterangan tidak menyokong perkara ini. Berdasarkan peruntukan jelas dan nyata berkaitan pemerolehan harta sebelum perkahwinan bawah s. 76(5) Akta, isu amanah berbangkit sama sekali tidak timbul.

Case(s) referred to:
Hodgson v. Marks (1971) 2 All ER 684 ***(refd)***
Lim Bee Cheng v. Christopher Lee Joo Peng [1996] 2 CLJ 697 HC ***(dist)***
Loo Hon Kong v. Loo Kim Lim [2004] 4 CLJ 1 CA ***(refd)***
Phua Beng Hong v. Ho Shik Ho [2000] 2 CLJ 277 CA ***(dist)***
Sivanes Rajaratnam v. Usha Rani Subramaniam [2002] 3 CLJ 300 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 174
Law Reform (Marriage and Divorce) Act 1976, ss. 54(1)(d), 76(5)

Other source(s) referred to:
Bromley's Family Law, 8th edn, p 612

For the appellant - Amarjeet Singh & Avtar Singh; M/s Avtar
For the respondent - Jennifer Thomas; M/s Jennifer Thomas & Co

[Editor's note: For the High Court judgment, please see Shameena Nathesan v. Balakrishnan Kaliappan [2017] 1 LNS 1816 (affirmed).]

Reported by S Barathi

JUDGMENT

Rhodzariah Bujang JCA:

Introduction

[1] This appeal arose from the decision of the High Court in Shah Alam in respect of a petition for divorce filed by the respondent ("wife") against the appellant ("husband") which was granted by the learned Judicial Commissioner on 29 September 2017 wherein the marriage was dissolved and the wife was given the sole right over their matrimonial home located at No. 25, Jalan SS 4/10, 47301, Petaling Jaya, Selangor Darul Ehsan. That was not all. The husband was also restrained from entering or staying at the said house and to come into close contact with the wife on account of physical and mental abuse suffered by her at his hands. However, the aggrieved husband's appeal which we heard and dismissed on 25 April 2018 was not the only legal proceeding filed by the wife. There was an earlier divorce petition which she filed in 2013 for the same prayers to, *inter alia*, dissolve the marriage and for the sole right over the matrimonial home but this was dismissed by the High Court on 12 January 2015. On 29 July 2015, her appeal to this court was allowed in part in that the order in respect of the matrimonial home was set aside. On 28 September 2015, the Marriage Tribunal issued a certificate to say that the marriage was beyond saving (see p. 331 of the core bundle of documents) although the interviews by the Tribunal with the parties were held before the filing of the earlier petition. Following the dismissal of that appeal and the issuance of that certificate, the wife filed the second petition, which was the subject matter of this appeal before us, but in Kuala Lumpur High Court. However the petition was transferred to be heard in High Court Shah Alam. The second petition was filed after two fresh police reports were made by the wife against the husband on the same allegations of physical threats and abuses made in two earlier ones as well as her inability to access the matrimonial home. These reports appear at pp. 220, 221, 223, 225 and 226 of the core bundle of documents.

Decision Of The Learned Judicial Commissioner

[2] The learned Judicial Commissioner found that the marriage which was contracted by the parties on 17 January 2010 and without any issue, had irretrievably broken down. She considered the fact that the husband had been abusing the wife both physically and mentally and that she had lodged police

reports against him as mentioned above. The wife also alleged that she had to pay for the husband's debts, including his credit card bills and loans. Unable to stand the tortures anymore, she moved out of the matrimonial home where until the time of the trial, the husband remained there. As mentioned earlier, after the earlier decision by this court, she lodged two more police reports against him. There is also evidence that prior to the earlier order by this court, the husband had also lodged a police report alleging that jewelleries of the wife in the house and RM3,000 of his money was missing, which he suspected had been taken by her because only she had the other key to the house. The wife's evidence on the abuses were corroborated by her parents (PW1 and PW2) who confirmed the matrimonial discord as alleged by their daughter.

The husband, however, contended, *inter alia*, that these police reports were self-serving, that the police had never taken any action against him, that they had been staying together throughout 2011 to 2013 and the wife only left the matrimonial home almost a year after filing the first divorce petition, that is, on 2 November 2014. It is to be noted the wife in her witness statement said she left the matrimonial home in November 2013.

Irretrievable Breakdown Of Marriage

[3] Section 54(1) of the Law Reform (Marriage and Divorce) Act 1976 ("LRA") provides four circumstances which constitute proof of the breakdown of a marriage. The last one, s. 54(1)(d) is relevant here and that is "that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition". The learned Judicial Commissioner stated in her grounds of judgment that the parties have lived apart after the wife moved out sometime in 2013 and it is a statement which we agree with despite the husband's assertion that the wife only left on 2 November 2014, that is less than two years before the presentation of the petition. This is because of the sheer improbability of that assertion itself, gathered from the police reports that she made and the first divorce petition that she filed which to us justifies the acceptance of her evidence that she moved out in 2013. How could she continue to remain under the same roof with him or as deposed by the husband in his witness statement … 'continued with the marital relationship with me throughout until two or three days before the trial of the first petition which trial was on 2 November 2014 …' given the filing of the petition and the police reports? Further, an independent party, the marriage tribunal, has found that their differences were irreconcilable. In the face of all the evidence, the dissolution of the marriage was the only option left to the parties for the law could not be so blind and harsh and the court so cruel as to force a marriage upon parties who were barely civil to one another. We were also minded not

to make further deliberation on this issue in this judgement of ours for as stated by learned counsel for the husband at the hearing before us, the crux of the appeal was the matrimonial home.

Entitlement And Division Of The Matrimonial Home

[4] We have intentionally use the words 'matrimonial home' and not "matrimonial property or asset" to describe this house which was registered under the wife's name and bought *vide* a sale and purchase agreement dated 4 March 2009 from one Wong Yoke Leng and Woo Choong @ Woo Choon Yuen, which was two years before the marriage was registered. This is simply because a matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under s. 76(1) of the LRA in that a place where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented. The wife admitted that the husband paid for the deposit and solicitor's fees in respect of the purchase but which she paid back. The husband contended that he was not having a steady employment at that material time and therefore could not take up the loan in his name and this was why he said, the house was registered in the wife's name. However, in our view, this is not an acceptable reason for there is no legal impediment to register the property in their joint names even if what he said was true because as alluded to by the learned Judicial Commissioner in her judgment, it is a known banking practice to register the property in joint names even though only one of the registered owner obtained financing of the property.

[5] It is of course specifically provided under s. 76(5) of the LRA that assets acquired during a marriage includes the ones acquired before the marriage by one party but which "have been substantially improved during the marriage by the other party or by their joint efforts". Thus, the fact that the house had been the place of cohabitation after the marriage, which was an agreed fact at the trial, does not, with respect to learned counsel for the husband's written submission at para. 19 thereof, that the husband has proprietary rights over it, even when taken with the fact that at that material time of the trial of the second petition the husband was still residing in the house (see the agreed facts at p. 24 on the core bundle of the documents).

Acquisition Of The Matrimonial Home

[6] It was not disputed that the wife took a loan from OCBC Bank in her name to finance the purchase of the house. The Schedule for the monthly repayments of the loan has been reproduced by the learned Judicial Commissioner in her grounds of judgment at p. 26 of the supplementary records of appeal (Part A) which ranges from RM925 to RM1,000 per month, the last instalment being due on 4 September 2016. Learned counsel

for the husband has submitted, citing *Bromley's Family Law* (8th edn) at p. 612 that his client has beneficial interest in the house and has a right of occupation over it and following the decision in *Hodgson v. Marks* (1971) 2 All ER 684, he being in actual occupation of the home, had the right to occupy it. Therefore, he submitted the restraining order and/or eviction orders were wrongly granted by the court. First, we must state that the fact of occupation has been rendered academic before us because learned counsel for the husband stated at the beginning of his submission that the husband has left the matrimonial home. Further, the main grievance of the husband was not so much the right to occupy the matrimonial home but his entitlement to it and he said he was justly entitled to it because he paid for the 10% deposit of the purchase price, the loan instalments as well as the cost of a substantial renovation towards the property.

[7] The learned Judicial Commissioner, however, did not accept the above contentions despite the husband calling two witnesses from the Bank (DW1 was the manager of OCBC Bank and DW2 was an Executive from Maybank where the husband had his accounts with) as well as the contractor (DW3) who did the renovation to the house who claimed to have been paid by the husband. She found that because the monthly instalments were made *via* cash deposit machine as testified by DW1, there was no confirmation that they were made by the husband and although DW2 confirmed there were monies transferred from the husband's account to the wife's account, these were not reflective of the loan repayment because if they were so, the amount of such payments should follow the schedule of payments as reproduced earlier in her judgment. We pause the narration here to say that in fairness to the husband, we noted that he tendered the bank in slips which are reproduced at pp. 760 to 762 of vol. 2D (Part C) of the appeal record. Further, she found that the husband had only made direct payments to the wife's account in December 2015 to September 2016 (after the filing of the petition) and which to her was under "dubious circumstances'. The previous payments prior to these dates were not supported by any documentary evidence and there was an admission, said the learned Judicial Commissioner, by the husband that the wife had been paying for his credit card bills for which he repaid her monthly.

[8] As for the renovation cost, the learned Judicial Commissioner referred to the wife's evidence that she had paid him back for the said cost as she did the initial deposit by him. We pause here to note that in respect of the renovation costs, the evidence of DW3 at pp. 152 to 153 and 155 of the core bundle is that out of the renovation cost of RM120,000 plus, he had been paid RM81,000 by cash and cheque but he could not remember the amount paid by cheques. There was, however, no evidence of such payments tendered at the trial, such as bank statements or receipts of the payments.

A And according to DW3 in his cross-examination at p. 154 of the core bundle of documents, for the balance of the cost that is RM39,000, both of them agreed that it be forfeited which in itself is quite puzzling given that it was not a small sum, even though DW3 claimed that he and the husband were friends. Further, the husband testified that he paid DW3 with Eon Bank's B cheque but DW3 said it was a Hong Leong Bank cheque. Given the unsatisfactory state of the evidence pertaining to the renovation costs we could not fault the learned Judicial Commissioner for not acceding to the husband's contention of bearing the full cost of the renovation.

[9] Her Ladyship, on the other hand, found the wife to be a credible C witness and her reasons for finding the case for her appears at paras. 21 to 22 of the grounds of judgment as follows:

> [21] I find the evidence of PW to be consistent throughout and she was very clear in that she paid the monthly instalment for the housing loan for the said property and she said the money transferred from RH to her D account is actually for the advances RH took from her. I am also of the opinion that if it is true that RH had been paying the loan for the said property, there is no necessity for him to transfer money to the PW's account when he can pay direct to the account as he did in 2016 (partly). Consequently, in my mind, RH has not been paying for the said property and even if it is true that the transaction from p. 372-373 is direct payment E *via* the CDM to the said property account, that alone does not support RH's evidence because as admitted by DW1, the OCBC bank would not know who deposited the said money. I also take note that the RH has a house in Johor Bahru at No 8, Jalan Kemajuan 1, Taman Universiti, Skudai, Johor for which PW is not making any claim on this landed property. In the circumstances and on a balance of probabilities, I am F inclined to hold that RH did not pay for the said property as claimed by him and therefore there was no contribution made by him towards the upkeep or maintenance of said property.
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> [22] In the circumstances of the case, it is my considered view that the said property which was irrefutably acquired by PW under her personal G name before she was even married to RH, cannot be held out as being a property held on trust for the benefit of RH in the absence of materials of probative value to substantiate such a claim by RH. The evidence adduced by PW in that regard is sufficient in my mind to rebut such an unbelievable claim. If it be true that PW was holding the property on trust for RH then there should be some trust instrument executed between the H parties as a security measure to attest to the same and/or indorsement on the issue document of title to prove the existence of the alleged trust. The argument by RH that at the time of purchase he was not entitled to any loan since he is not working is not a factor to stop the parties from naming him as the owner thereof or holding half of the undivided share in the said property if the issue of trust is to be their intention from the I outset. Though two names may appear on the issue document of title, but

> one person procures the loan from the bank is a known practice in the industry. Claiming a trust is one thing but legally proving it is quite another. These facts taken in totality would support an inference that it was never PW's intention to make it a matrimonial property and/or a trust property. Consequently therefore, I am of the considered view that the said property is not caught as matrimonial asset whereby I am not obligated to divide the said property pursuant to the Act and which would be in line with the principles set out by the Court of Appeal in *Yap Yen Piow*'s case *(supra)*. From the evidence presented by PW, she is solely responsible and liable to the financing bank for the purchase of the said property for which she is currently servicing the loan. Evidence would also show that RH had been staying there for free since 2010 and refuses to hand over possession to PW. Such a conduct and the manner in which it was displayed would adversely reflect upon the character and credibility of RH in the circumstances of the case.

In other words, the learned Judicial Commissioner was of the view that the acquisition of the house was by the sole effort of the wife before the marriage and there was no substantial improvement to it by the husband after the marriage based on the evidence and considerations made above. These two factors are the express requirements of s. 76(5) of the LRA and as was cautioned by Abdul Hamid Mohamed JCA (as His Lordship then was) in *Sivanes Rajaratnam v. Usha Rani Subramaniam* [2002] 3 CLJ 300; [2002] 3 MLJ 273:

> The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into consideration the factors laid down in section 76 of the Act. It must be remembered that the court is dividing matrimonial assets and not assessing damages.
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> In dividing matrimonial assets pursuant to a divorce, the courts in Malaysia should pay special attention to the provisions of the Act and not rely uncritically on decided cases from other jurisdictions except perhaps those from Singapore where the relevant law is similar. It is not advisable to rely ingenuously on English cases.

We raise this quotation because learned counsel for the husband has cited a number of English cases in support of his client's entitlement to the property and which with respect, given the clear wordings of the said s. 76(5), the court's consideration of the claim for the matrimonial home must be based, from the facts of this case on the evidence pertaining to the monetary contribution to its acquisition and improvement. In respect of *Yap Yen Piow*'s case cited by the learned Judicial Commissioner in the quotation above, our attention was drawn to para. 11(c) of the said judgment which is reproduced below together with the earlier paragraphs:

A Jurisprudence Relating To Matrimonial Property And Non-Matrimonial Assets And Provision For Maintenance

Division of assets

[11] Section 76 of the LRA 1976 is the key statutory provisions to deal with the division of the property. In principle, it differentiates
B assets acquired during the subsistence of marriage into three types. They are as follows:

(a) any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see section 76(1) of the LRA
C 1976);

(b) any assets acquired by one party by sole effort which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (see section 76(3) of the LRA 1976); and

D (c) assets which were acquired before the marriage, but has been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not fall in that category
E (see section 76(5) of the LRA 1976).

(see *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697; [1997] 4 MLJ 35; *Phua Beng Hong v. Ho Shik Ho* [2000] 2 CLJ 277; [2002] 2 MLJ 289 (CA)).

F It must be noted that the two cases cited in the said para. (c) are distinguishable from the facts in the case before us because in *Lim Bee Cheng*'s case *(supra)*, although the property was purchased by the respondent prior to the marriage but the name of the petitioner was also registered as its joint owner before the marriage was solemnised. In *Phua Beng Hong*'s case *(supra)*,
G according to the judgment, the asset which was acquired by and registered in the respondent's name was disposed a few years after the registration of the marriage in 1972 and that the order for division of property between the parties at the hearing of the petition was in respect of 2 other assets acquired after the marriage which was a landed property in Johor Bahru and a Toyota car. Coming back to the facts in this appeal before us, on the evidence
H adduced, we have to agree with the learned Judicial Commissioner that the husband has failed to prove that he had a hand in the acquisition of and had made improvements to the matrimonial home.

Issue Of Resulting Trust

I **[10]** Learned counsel for the husband has another take to his client's entitlement to the property. He submitted that based on this court's decision in *Loo Hon Kong v. Loo Kim Lim* [2004] 4 CLJ 1, a resulting trust has been

created in respect of the matrimonial home in favour of his client since he had paid for the deposit and solicitors fees (as admitted by the wife but which she claimed had been paid back) as well as the loan instalments. The cited case concerns parties to the case who were brothers and the purchase by the plaintiff of a piece of land but which was registered in the defendant's name. The action was filed following the defendant's refusal to accede to the plaintiff's request to transfer half share in the land to the plaintiff which the High Court refused to order but which decision the Court of Appeal reversed. Gopal Sri Ram JCA (as His Lordship then was) said at p. 10 of the report said:

> The plaintiff having paid the entire purchase price for the land, the act of registering the land in the defendant's name merely vested the nominal legal ownership in the latter. The beneficial ownership results to the plaintiff. This is because the relationship between the parties here does not come within one of the special categories recognised by equity as creating a presumption of advancement in favour of the holder of the legal title.
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> The very limited and well-established circumstances in which a resulting trust may arise were dealt with by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669, 708. He said:
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> > Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see Underhill and Hayton pp. 317ff, *Vandervell v. IRC* [1967] 1 All ER 1 at 8, [1967] 2 AC 291 at 312ff and *Re Vandervell's Trusts (No 2), White v. Vandervell Trustees Ltd* [1974] 1 All ER 47 at 63ff, [1974] Ch 269 at 288ff. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid* and *Barclays Banks Ltd v. Quistclose Investments Ltd* [1968] 3 All ER 651, [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J in *Re Vandervell's Trusts (No 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not

> convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as *bona vacantia*: see *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1970] 1 All ER 544, [1971] Ch 1.
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> We pause to emphasise – if emphasis is required – that the categories of cases in which a resulting trust may arise are closed and no new category may now be admitted. In particular we would reject – as did the House of Lords in *Westdeutsche Landesbank* – the suggestion by Professor Peter Birks ("Restitution and Resulting Trusts" in Equity and Contemporary Legal Developments page 335 and 360) that a resulting trust should arise wherever money is paid under a mistake or when money is paid on a condition which subsequently fails."

In order to resort to the aid of a resulting trust, the husband bore the burden of proving, as in the cited case, above that he paid fully for the purchase of the matrimonial home or partly as enunciated in the principle just quoted above. The evidence as assessed by the learned Judicial Commissioner which we had reproduced earlier does not support that this was so at all. Thus, the issue of the creation of such a trust on the facts of this case does not arise. Primarily, however, we are of the view that given the clear and explicit provision which caters for acquisition of property prior to the marriage under s. 76(5), the issue of a resulting trust does not arise at all. Such a trust is only an issue for parties not in matrimony for those who are, their rights to matrimonial assets acquired before and after marriage have been adequately provided for under the LRA. In this regard, it is pertinent to refer firstly, to the preamble of LRA which states:

> An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; **and to provide for matters incidental thereto.** (emphasis added)

Secondly, to s. 174 of the Interpretation Acts 1948 and 1967 which provides as follows:

> **Section 17A. Regard to be had to the purpose of the Act**
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> In the interpretation of a provision of an Act, **a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred** to a construction that would not promote that purpose or object. (emphasis added)

In our view, since the whole purpose of enacting the LRA is to provide for matters relating to and incidental to marriages contracted thereunder, recourse to rights provided outside of the LRA, particularly pertaining to one which has been specifically spelt out in it, which in this case was the parties' entitlement to the matrimonial property, should not be allowed.

We therefore dismissed the appeal with an agreed cost of RM5,000 to the wife subject to allocatur.